

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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<i>In the Matter of</i>)	
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Rules and Regulations Implementing The)	CG Docket No. 05-
338		
Telephone Consumer Protection Act of 1991)	
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COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION

The American Financial Services Association (“AFSA”)¹ appreciates this opportunity to comment on the rules proposed to implement the Junk Fax Prevention Act of 2005. AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA’s members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance. AFSA has chosen to file these comments because many of our members do utilize interstate fax communications as one way

¹ Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit. AFSA member companies offer or are assigned many types of credit products including credit cards, retail credit, automobile retail installment contracts, and mortgage loans.

to market products and services, and for other purposes directly related to their businesses including communications with other businesses in the sales channels such as retailers, dealers and brokers.

Established Business Relationship (EBR) Exception

Section 2(a) of the Junk Fax Prevention Act amends Section 227(b)(1)(C) of the Act by adding an established business relationship exemption (EBR) to the prohibition on sending unsolicited facsimile advertisements. The FCC proposes the following definition of an EBR: "For purposes of paragraph (a)(3) of this section, the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

AFSA agrees with the FCC's proposed definition, provided there are no time limits placed on the duration of an EBR. Since the fax recipient has the ability "at any time" to request that they not receive further unsolicited faxes from the sender, the ability of the sender to continue to send unsolicited faxes should be unlimited as long as the EBR definition is satisfied and the recipient has not opted out of receiving faxes. Similarly, AFSA does not believe the so-called "18/3-month" limitation on an EBR is appropriate, especially in connection with faxes to business recipients. AFSA members customarily continue long term relationships with those

businesses to which our members offer and provide financing services, and it does not seem appropriate that our members should be burdened with calculating how many months have elapsed since the initial application or last business transaction. Again, as long as the EBR exists and as long as the recipient has not opted out of receiving faxes, businesses should be permitted to send unsolicited fax advertisements.

EBR's Formed Prior to July 9, 2005.

If the fax sender has usual course of business records evidencing an EBR with an entity prior to July 9, 2005, then AFSA believes that such sender should be permitted to send unsolicited fax advertisements to such entity. Since there has been no regulatory requirement to maintain proof of when or how a fax number was obtained, senders would be unduly burdened by a requirement to establish such details after the fact. There should be a presumption with respect to such pre-July 9, 2005 EBR's that the fax number was validly obtained as a result of the ongoing relationship, including a presumption that the sender possessed the fax number as of July 9, 2005.

Providing a Fax Number Within an EBR.

AFSA urges the Commission to adopt the position that the sender should not be burdened with establishing that the recipient has voluntarily made its fax number available, as long as there is an EBR. Again, the presumption should favor

the EBR between sender and recipient, without concern as to the source or means by which the recipient's fax number was obtained. As a result of the EBR, there may be any number of documents, applications, agreements and other communications exchanged between the parties. Any one or more of such documents may contain the recipient's fax number. Additionally, the recipient's fax number may be available through a third party or other public source. As long as the sender can establish a valid EBR, the FCC should not be concerned with the details of how the sender obtained the fax number. Consistent with our earlier remarks, the recipient always has the option to specifically request that the sender not send any more faxes.

Request Not to Receive Future Unsolicited Fax Advertisements:

Senders of unsolicited fax advertisements are required to include a notice informing the recipient of the means by which such recipient can request not to receive future unsolicited fax advertisements. AFSA agrees that a sender should provide a telephone number and fax number for recipients to communicate such requests. Additionally, senders should only be obligated to comply with requests that are properly communicated to senders using the specified numbers. AFSA members' customer service operations are segmented and have numerous points of contact with business and consumer customers; therefore, a business should not be expected to process a "do not fax" request that is communicated to any customer

contact point, other than the specific contact numbers established by us for that purpose. Additionally, as part of an ongoing EBR, senders may contact business and consumer customers through numerous operations and by numerous methods of communication, including faxes. Consequently, although AFSA agrees that a sender must comply with the recipient's request to not receive future unsolicited faxes, AFSA believes such a request should not terminate the EBR between sender and recipient. The Commission should still consider the EBR to be maintained and continuing, as long as the EBR definition is satisfied, regardless of whether the recipient subsequently opts-out of receiving future faxes.

Authority to Establish Nonprofit Exception

Finally, AFSA strongly urges the Commission to allow tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the "opt out" notice. Trade associations like AFSA have a continuing and compelling interest in recruiting and retaining members. Unlike other businesses, trade association members are both "owners" of the entity and customers at the same time. In addition to the inherent self-governing mechanism of associations that would allow an association's Board of Directors to prohibit or limit unsolicited fax communications from the association to its members, the association has a strong self-interest in complying with any member's request to restrict fax communications. Therefore, no "opt-out" notice is necessary or desirable for nonprofits. If the nonprofit is sending a communication that it is authorized to send consistent with its tax-exempt status, this alone should

be regarded as a presumption that the communication is being sent “in furtherance of the association’s tax-exempt purpose.”

AFSA appreciates the opportunity to comment on the Proposed Rule and thanks the Commission for their efforts. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert E. McKew", with a long horizontal flourish extending to the right.

Robert McKew
Senior Vice President and General Counsel
American Financial Services Association